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Mr. Tom Howard
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Via Federal Express and Electronic Mail: tom.howard@waterboards.ca.gov

Re: Withdrawal of Administrative Civil Liability Complaint R7-2014-0041 Issued to National Beef California, LP

Dear Mr. Howard:

We represent National Beef California, LP in the above-referenced matter. On October 2, 2014, we received a letter from Jose L. Angel of the Colorado River Basin Regional Water Quality Control Board advising that the above-referenced Civil Liability Complaint had been withdrawn. In addition, Mr. Angel provided a copy of his October 2, 2014 memorandum to you requesting that the State Board on its own motion take up this matter. In the memorandum, Mr. Angel invites National Beef to provide comments on this request. National Beef welcomes the opportunity to comment on that request and to provide important substantive considerations for the State Board in this regard.

The withdrawal letter and memorandum base the withdrawal of the Complaint on the due process violations detailed in National Beef's Motion to Dismiss on those grounds. What Mr. Angel did not address, however, are the Complaint's myriad substantive defects that preclude any finding of pass through or interference against National Beef. This letter provides a brief summary of the substantive defects, all of which are fully set forth in National Beef's September 19, 2014 submission in the now withdrawn Regional Board action.

The Regional Board complaint alleged National Beef caused pass through and interference at the Brawley wastewater treatment plant ("WWTP"). The Complaint alleges that the City of Brawley violated its NPDES permit limits for ammonia, Biochemical Oxygen Demand ("BOD"), Total Suspended Solids ("TSS"), and whole effluent toxicity some 375 times during the period of National Beef operations. The complaint then concludes that because the City violated its limits, National Beef must have caused the violations by pass through and interference for the entire time National Beef operated the beef plant in Brawley.

"The term Indirect Discharge or Discharge means the introduction of pollutants *into* a publicly-owned treatment works ("POTW") from any non-domestic source regulated under section 307 (b), (c) or (d) of the Act." 40 C.F.R. § 403.3(i) (emphasis added). "Interference" and "pass through" are defined in each case to be a "Discharge" which is a "cause" of pass through or interference at a POTW. 40 C.F.R. 403.3(k) and (p). Therefore, before it could charge National

Beef with any violation of the Clean Water Act pursuant to pass through or interference, the State Board would be required to identify "Discharges" **FROM** National Beef **TO** the Brawley WWTP that caused the Brawley WWTP to violate its NPDES permit.

The Regional Board Complaint does not identify a single "Discharge" from the National Beef plant that allegedly caused the Brawley WWTP to violate its NPDES permit. Instead, the Complaint focuses exclusively on the Brawley WWTP discharges that violated Brawley's NPDES permit and contends without any proof that National Beef is liable for these discharges. That is not the law.

The Complaint's "Alleged Violations of Pass Through and/or Interference" from paragraph 36 through 41 discuss only discharges from the Brawley WWTP. Not one "Discharge" from National Beef's facility is mentioned in this discussion. Instead, the Regional Board simply concludes the following:

42. Because the city of Brawley violated its NPDES Permit ammonia Effluent Limitations contained in WDRs Order R7-2005-0021 and its NPDES Permit Effluent Limitations and Receiving Water Limitations for acute and chronic toxicity contained in WDRs Orders R7-2005-0021 and R7-2010-0022, following NBC's commencement of discharges to the Brawley WWTP in June 2006, and because the discharge from NBC was a significant source of ammonia which caused and/or contributed to the violations and their magnitude and frequency, the discharge from NBC into the Brawley WWTP consistently caused Pass Through and/or Interference from June 2006 until approximately July 2011.

Complaint, ¶ 42. Therefore, instead of identifying a single "Discharge" from National Beef, the Complaint simply assumes that National Beef is responsible for every NPDES violation at the Brawley WWTP. Again, that is not the law.

In light of the Regional Board Complaint's complete failure to identify a single "Discharge" from National Beef that is alleged to have caused pass through or interference and the improper attempt to charge National Beef based solely upon Brawley WWTP discharges, the Regional Board Complaint would fail as a matter of law.

California Water Code section 13323(a) provides that administrative civil liability may be imposed in a Regional Board complaint that "shall allege the act or failure to act that constitutes a violation of law . . ." Section 13323(c) provides for such a complaint to be issued by the State Board. The Complaint that the Regional Board requests that the State Board take up against National Beef does not meet this basic threshold because it does not allege a single act by National Beef that is a violation of law. Therefore, the State Board would need to make independent engineering evaluations and determinations (the very evaluations and determinations the Regional Board failed to make) that there were specific actions by National Beef that violate applicable law before the State Board could proceed with any action in this regard.

Peter Silva, former State Board member and immediate past Assistant Administrator for the Office of Water, US Environmental Protection Agency, summed up the situation in his expert testimony in this matter by saying:

Another disturbing aspect of Mr. Angel's enforcement approach is that he imposes fines on NBC [National Beef California] for non-compliance of requirements imposed on the City, not NBC. In imposing fines to NBC, Mr. Angel consistently makes note that "the City of Brawley violated . . ." in reference to violations of NPDES water quality standards. He does not say that NBC caused violations..." He makes no attempt to correlate the violations by the City to any relevant data on how NBC could be responsible for those violations. Instead, he attempts to use the pass through and/or interference argument as a catch-all to make NBC totally responsible for the City's NPDES violations.

The cause of the Brawley WWTP NPDES permit violations was, in fact, the Brawley WWTP itself. The Brawley POTW was in violation of its NPDES permit limitations before the beef plant was even constructed. (*See* Testimony of Jim Stahl). This fact alone belies any conclusion that National Beef's conduct was the cause of the Brawley POTW NPDES violations. Further, it is indisputable that the Brawley POTW was designed and operated in such a way that made it impossible for the Brawley POTW to effectively treat any ammonia. (*See* Testimony of Jim Stahl, and Memorandum of Jose Angel, Exhibit 45 to the evidence submission of the Prosecution Team). Indeed, the Regional Board has previously admitted in Administrative Civil Liability Complaint R7-2013-0028 issued to the City of Brawley as the Owner/Operator of the Brawley POTW that the Brawley POTW could not comply with the NPDES permit limits even if there were no discharges from National Beef:

18. As shown in Finding Nos. 8 through 15, cited above, since 1999 the Discharger [City of Brawley] has struggled to comply with its previous NPDES permit limits for chronic and acute toxicity, Biochemical Oxygen Demand (BOD), Total Suspended Solids (TSS), and bacteria limits, and particularly with its current NPDES permit limits for ammonia. Based on the Discharger's history of non-compliance with effluent limitations and actual and potential harm to water quality, Regional Board staff reasonably concluded that ***the Discharger's WWTPs did not have the necessary capacity to properly treat existing ammonia loads from domestic sewer users, let alone increased ammonia loads from new industrial users, including National Beef Company***, even with the upgrades to flow and treatment capacity the Discharger completed in response to TSO 99-054 and CAO R7-2004-0079.

Prosecution Team Evidence Submission, Exhibit 5, at NBC_ACLC_PT-001883-84 (emphasis added). This is a judicial admission that is binding on the Regional Board. *See, Lopez-Reyes v. Immigration and Naturalization Service*, 694 F.2d 332 (5th Cir. 1982); *see also, Bonnichsen v. U.S. Dept. of the Army*, 969 F. Supp. 614 (D. Ore. 1997).

Jim Stahl, Vice President and Senior Technical Advisor for MWH Global and long-time Chief Engineer and General Manager for the Los Angeles County Sanitation Districts, reviewed the

engineering, design and operation of the City of Brawley WWTP for the time relevant to this matter and assessed the pass through and interference allegations against National Beef. He concluded that the City had a complete failure of treatment systems for a prolonged period of time and that National Beef could not have caused City of Brawley NPDES violations stating:

Bottom line: When a properly designed and operated treatment system was placed in service at the Brawley WWTP the requisite treatment and nitrification was attained. In my opinion, the Lee & Ro system startup experience [the new City treatment system started up in 2011] clearly demonstrates that there was no inhibition, interference or pass through caused by the quality or strength of the Brawley WWTP influent. Specifically, National Beef did not cause the violation of the Brawley WWTP NPDES permit for purposes of interference or pass through. The quality of the influent was not an issue.

In consideration of all of the above discussion I conclude that neither the National Beef discharge nor the eventual amalgamation with the other discharges to the Brawley collection system resulted in influent Brawley WWTP ammonia concentrations at a level that would cause pass through or interference and prevent the attainment of nitrification and compliance with ammonia discharge standards. The problem was the lack of a suitable wastewater treatment system not in the quality of the influent. In such a case the EPA guidance document on Interference and Pass Through clearly states that "If a malfunction or improper operation by the POTW, rather than an industrial user's discharge, causes the POTW's noncompliance with its NPDES permit or sludge requirements, interference and/or pass-through are not occurring."

Nathan Zaugg, the global industrial wastewater lead at MWH Global, testified that, "even if National Beef had not discharged ammonia during the period of concern, the Brawley WWTP could not have met its permit obligations with respect to ammonia and the resultant toxicity." Mr. Zaugg analyzed all of the data reflecting the discharges from the National Beef plant and the NPDES permit violations from the Brawley WWTP and determined that "when the concentration of ammonia leaving the Brawley WWTP and the National Beef pretreatment facility are plotted against one another, there is very weak correlation." There is simply no data to support to allegation that National Beef caused any event of pass through or interference at the Brawley WWTP.

It was only when the Brawley POTW redesigned its WWTP and implemented the upgrades that the NPDES permit violation ceased. The conduct of National Beef had no impact on the ability of the Brawley POTW to comply with its NPDES permit limits. Indeed, National Beef's conduct remained unchanged both before and after the Brawley POTW initiated the upgrades to its system. The cause of the NPDES violations was always the Brawley POTW itself.

National Beef's September 18, 2014 submission to the Regional Board demonstrated additional defects in the substance of the charges against National Beef:

1. The Complaint and Regional Board submissions do not establish the requisite causation as to pass through and interference. The fundamental failing of the Complaint and the

evidentiary submission offered in support of the Complaint is that there is nothing to support the assumption that National Beef caused the NPDES violations at the Brawley WWTP. The law is very clear that National Beef cannot be responsible for pass through or interference if the Brawley WWTP was the cause of the NPDES violations. That is exactly what occurred in this case.

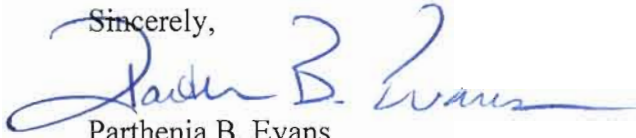
2. National Beef has an affirmative defense to allegations of pass through and interference pursuant to 40 C.F.R. section 403.5(a)(2) because National Beef did not know or have reason to know that its discharge, alone or in conjunction with the discharges of others would cause pass through or interference and National Beef was in compliance with local limits designed to prevent pass through or interference.
3. The Complaint impermissibly assesses administrative civil liability penalties for alleged violations of prohibitions against pass through and interference that already have been enforced by the City of Brawley under Wastewater Pretreatment Ordinance, Chapter 22, Art. II. (Exhibit 983 to National Beef Evidentiary Submission) The Regional Board's action duplicates 163 administrative penalty actions under which the City fined National Beef \$723,000 and seeks \$3,750,000 for the same alleged conduct. This results in windfalls to the City and the Regional Board and impermissibly subjects National Beef to dual enforcement and double fines. Such enforcement is barred as a matter of law.
4. The claims recommended by the Regional Board are barred because it delayed in taking any action for far too long leading to loss of evidence, lack of memory, death or other unavailability of witnesses and loss of physical evidence (i.e. the treatment systems at issue no longer exist).
5. A wholly inappropriate assessment of civil administrative penalty under law and guidance and the assessment of double, triple, and sometimes quadruple penalties for the same NPDES infractions on the part of the City of Brawley, depending on the type and duration of effluent limitation measurement.
6. A wholly unsupported assessment of economic benefit to National Beef that does not account for the \$17,306,000 National Beef spent in wastewater pretreatment systems over the years National Beef operated the beef plant.

The overarching story that the Complaint distorts is one of a poorly designed and operated City POTW that the Regional Board failed for nearly two decades to effectively oversee and enforce. It was not until 2012 that the City of Brawley finally constructed adequate treatment works and it was not until 2014 that the City submitted an approvable pretreatment program to meet requirements imposed as long ago as 1995. The interim POTW NPDES violations were not caused by National Beef and National Beef had no obligation to see that the POTW was properly designed and operated, yet the Regional Board complaint would hold National Beef responsible for the conduct of the POTW.

Mr. Tom Howard
October 9, 2014
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We look forward to having productive discussions that will lead to conclusion of this matter. We would be pleased to talk with you at any time and can be reached at 816-691-3127 (Parthy Evans) or 303-376-8410 (Perry Glantz).

Sincerely,

A handwritten signature in blue ink, appearing to read "Parthenia B. Evans". The signature is fluid and cursive, with the first name being the most prominent.

Parthenia B. Evans
Perry L. Glantz

cc:

Mr. Jose L, Angel
Mr. Robert E. Perdue
Ms. Lori Okun
Mr. Tom Vandenberg
Mr. Chris Carrigan
Ms. Anna Kathryn Benedict
Mr. Gideon Kracov